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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

ERNESTINE CASTRO,

Plaintiff and Appellant,

v.

STATE PERSONNEL BOARD,

Defendant and Respondent;

EMPLOYMENT DEVELOPMENT  
DEPARTMENT,

Real Party in Interest and  
Respondent.

No. B163374

(Super. Ct. No. BS069971)

APPEAL from a judgment of the Superior Court of Los Angeles County.

David P. Yaffe, Judge. Affirmed.

Ernestine Castro., in pro. per., for Plaintiff and Appellant.

Howard L. Schwartz, Chief Counsel, and Barrett W. McInerney, Labor  
Relations Counsel for Defendant and Respondent and for Real Party in Interest and  
Respondent.

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Plaintiff and appellant Ernestine Castro appeals from a judgment following the denial of her petition for writ of mandate to overturn a decision of the State Personnel Board (SPB) dismissing her employment with the Employment Development Department (EDD). We affirm.

### **FACTUAL AND PROCEDURAL BACKGROUND**

Castro began her employment with the EDD in June 1990 as an employment program representative. Nine years later, on October 29, 1999, while employed as a “permanent intermittent employee,” Castro was dismissed from her employment. Castro appealed her dismissal to the SPB.

#### *Factual Findings of the ALJ*

The SPB conducted an evidentiary hearing on April 25 and July 10, 2000 before Administrative Law Judge William A. Snyder (ALJ). Castro was present at the hearings and was represented by attorney Stephen A. Madoni. The EDD was represented by its staff counsel, Glenn Jones. The EDD called four witnesses and produced 18 exhibits. One witness testified on behalf of Castro -- her psychiatrist, Dwight Bergquist, M.D.<sup>1</sup> Following the hearings, on November 30, 2000, the ALJ issued a proposed decision in which he made the following findings of fact:

During 1998 through 1999, Castro was infatuated with fellow employee, Robert Fisher, manager of the EDD’s Orange County Primary Adjudication Center. In September 1998, she was instructed not to initiate any contact with Fisher. In December 1998, Castro was suspended for seven days for approaching Fisher and sending him flowers. Effective June 1, 1999, Castro received a reduction in salary as discipline for sending Fisher a personal greeting card and invitation to dinner, and calling him at home.

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<sup>1</sup> The full transcripts of these hearings are not part of the record on appeal.

On June 10, 1999, Castro informed a claimant to the EDD that she was “having a nervous breakdown,” which alarmed the claimant. On June 14, Castro’s supervisor, Michele Irving, issued a corrective action memorandum, instructing Castro that she could not alter previously arranged leave plans without the approval of her supervisor. On June 16, Castro told another supervisor that she was going to send a leave request to Fisher. Castro was again instructed not to contact Fisher. The following day, Castro was issued a second corrective action memorandum regarding leave plans. On June 28, July 6, and August 18, Castro extended her lunch breaks without authorization, and arrived late for work on August 19, 1999. On August 19, Castro lied to supervisor Irving about obtaining approval for use of leave time to extend her lunch breaks.

On August 9, 1999, Castro purchased a Bible from Cotter Church Supplies, Inc. and faxed instructions to Cotter for anonymous delivery of the Bible to Fisher’s residence. In her instructions, she identified herself as an EDD employee. On August 30, Castro purchased a one-pound box of See’s candy, and again arranged for anonymous delivery to Fisher’s residence. On September 3, 1999, Castro lied to EDD investigators about these incidents.

At the SPB hearings, Dr. Bergquist testified that he began treating Castro in mid-November 1999, following her dismissal. In his opinion, Castro suffered from a “psychotic disorder not otherwise specified,” but which he did not believe was schizophrenia. He testified that prior to his treatment of her, Castro “suffered from an altered sense of reality that included religious components, sexual innuendos, and people at work,” and that she experienced delusions and hallucinations.<sup>2</sup> He believed that Castro was “disturbed” when she arranged for delivery of the Bible to Fisher, but he acknowledged that Castro “could be purposefully deceptive, and was capable of

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<sup>2</sup> Throughout her opening brief, Castro makes repeated references to having heard noises and beeps coming from her computer that referred to “sexual abuse, sex and marriage” that she attributed to Fisher, and having heard God speaking to her.

realizing if she was being truthful or not.” Dr. Bergquist believed that Castro’s condition had improved with prescribed medications, but that her symptoms were likely to reappear if she stopped her medication. He testified that without her medication, she could be a danger to someone she perceived as being a danger to herself.

Based on the evidence presented and the prior unsuccessful efforts to alter Castro’s behavior with progressive discipline, the ALJ concluded that good cause existed for her dismissal. The SPB adopted the ALJ’s proposed decision. Castro’s request that the SPB grant a rehearing of her case was denied.

### *Petition for Writ of Mandate*

On June 13, 2001, Castro filed a verified petition for writ of mandate in the superior court to “set aside the [ALJ’s] decision.” She complained that her attorney did not allow her or certain other witnesses to testify on her behalf. Although the petition indicated that she was appearing in propria persona, attorney Andrew Schwartz later appeared as her counsel of record.<sup>3</sup>

On July 30, 2002, Castro’s attorney filed an opening brief (which is identical to her opening brief on appeal), in which Castro complained that in addition to refusing her request to testify, her attorney also failed to raise the defense of wrongful termination in violation of the Americans With Disability Act (ADA). Castro attached the following documents to her opening brief: Castro’s affidavit, dated June 9, 2001, of “what I would have said, if I would have testified”; a handwritten letter dated January 9, 2001, purportedly signed by Dr. Bergquist and clarifying his statement that Castro “could be purposefully deceptive, and was capable of realizing if she was being

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<sup>3</sup> The matter was originally assigned to the Honorable Dzintra Janavs, who recused herself after she was informed that several anonymous communications which had been received by her, including at least one of a threatening nature, were attributed to Castro. The case was reassigned to the Honorable David Yaffe.

truthful or not” as happening only when she was in a delusional state; a typed letter dated December 16, 1999 purportedly signed by Dr. Bergquist stating that Castro “acknowledges that she exhibited some inappropriate and out-of-character behaviors during April through November of this year”; and unidentified excerpts of testimony before the ALJ.

On August 27, 2002, the EDD filed its own opening brief. On October 28, 2002, the parties, each represented by counsel, appeared at a hearing before Judge Yaffe. No transcript of this hearing is included in the record on appeal. By minute order of the same date, Judge Yaffe denied Castro’s petition for writ of mandate. Judgment was entered on December 30, 2002. This appeal follows.<sup>4</sup>

## DISCUSSION

“The State Personnel Board is a statewide administrative agency deriving its adjudicative powers from the Constitution; accordingly, its factual determinations must be upheld by a reviewing court if they are supported by substantial evidence, and all legitimate and reasonable inferences must be drawn in support of such findings.” (*Warren v. State Personnel Bd.* (1979) 94 Cal.App.3d 95, 105.) “Again, neither the trial court nor the appellate court is entitled to substitute its discretion for that of the administrative agency concerning the degree of the punishment imposed. [Citation.] Agencies are vested with high discretion and its abuse must appear very clearly before

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<sup>4</sup> We note that Castro’s notice of appeal was prematurely filed on November 26, 2002, prior to entry of judgment. Because the trial court had already issued its order denying Castro’s petition for writ of mandate, we exercise our discretion under California Rules of Court, rule 2(d)(2) to treat the appeal as having been filed immediately after entry of judgment.

We also note that an order or judgment denying a petition for writ of mandate is appealable. (See, e.g., *Catalina Investments, Inc. v. Jones* (2002) 98 Cal.App.4th 1, 5, fn. 3; *Laraway v. Pasadena Unified School Dist.* (2002) 98 Cal.App.4th 579, 583.) Respondents cite us to Code of Civil Procedure section 963 for this proposition, but this section has been repealed.

courts will interfere.” (*Deegan v. City of Mountain View* (1999) 72 Cal.App.4th 37, 48.)

On appeal here, Castro does not challenge the SPB’s findings for lack of substantial evidence or otherwise contend that the SPB abused its discretion. Rather, Castro finds fault with the attorney who represented her before the SPB hearings, contending that he (1) refused to allow her to testify, refused to elicit additional testimony from Dr. Bergquist and refused to call additional witnesses on her behalf, and (2) failed to raise a potential defense of wrongful termination in violation of the ADA. Castro believes that had her attorney acted otherwise, her dismissal of employment would have been overturned.

To support her position, Castro submitted to the trial court two documents prepared well after the April 25 and July 10, 2000 SPB hearings and well after the SPB issued its decision in December 2000: (1) Castro’s affidavit, dated June 9, 2001, which is a summary of what she “would have said, if I would have testified,” and (2) a handwritten letter, dated January 9, 2001, purportedly signed by Dr. Bergquist clarifying his testimony at the hearings.<sup>5</sup> But Castro does not contend that she attempted to present this evidence at the SPB hearings and that it was improperly excluded by the ALJ.<sup>6</sup> To the contrary, she states in her affidavit that “I wanted to testify. I protested and the *lawyer* said no.” (Italics added.)

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<sup>5</sup> Castro also submitted two additional documents, including unidentified excerpts of testimony actually given at the SPB hearings, and a typewritten letter purportedly by Dr. Bergquist, dated December 16, 1999. It is not clear from the record if this letter was introduced at the hearings.

<sup>6</sup> Castro briefly asserts that the ALJ disregarded the testimony of her only witness, Dr. Bergquist, and disregarded the testimony of management that she was delusional and talked to God. But Castro points to nothing in the record to support this assertion, and the ALJ’s proposed decision directly contradicts this assertion. The ALJ cited extensively to Dr. Bergquist’s testimony, and concluded that while Castro’s mental disorder explained her unreasonable infatuation with Fisher, it did not excuse or mitigate her misconduct.

In denying her petition for writ of mandate, the trial court stated the following in its minute order: “Petitioner cites no authority for the proposition that ineffectiveness or mistakes by private counsel retained by her at the administrative level is a legitimate basis for vacating the administrative decision. The court knows of no such authority except in cases in which a party has a right to counsel guaranteed by the constitution or some statute. Petitioner cites no authority to the effect that she has any such right to counsel in administrative proceedings of the type conducted in this case.” We agree with the trial court’s finding. Castro’s dissatisfaction with the legal strategy employed by her privately retained counsel is a matter to be addressed between Castro and her attorney; it does not constitute a basis for overturning an administrative decision.

We also agree with the trial court’s further conclusion: “It would be error for this court to grant relief to petitioner on a legal theory that was never presented during the administrative proceedings. Petitioner has failed to exhaust her administrative remedies with respect to her contention that she was denied accommodation under the Americans With Disabilities Act.” (See, e.g., *NBS Imaging Systems, Inc. v. State Board of Control* (1997) 60 Cal.App.4th 328, 337 [“The superior court erred in granting relief based on a legal theory never presented during the administrative proceedings”].)

We conclude that Castro has failed to present any basis to justify judicial interference with the SPB’s decision. Accordingly, we affirm the trial court’s denial of her petition for writ of mandate.

**DISPOSITION**

The judgment is affirmed. Respondents to recover their costs on appeal.

NOT FOR PUBLICATION.

\_\_\_\_\_, J.

DOI TODD

We concur:

\_\_\_\_\_, P.J.

BOREN

\_\_\_\_\_, J.

ASHMANN-GERST